

Saxony / Strack
appeal pleading

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MISSOURI
ATTORNEY GENERAL

IN THE CIRCUIT COURT
CAPE GIRARDEAU COUNTY, MISSOURI

SAXONY LUTHERAN HIGH SCHOOL, INC.,)
)
Petitioner,)
)
v)
)
MISSOURI DEPARTMENT OF)
NATURAL RESOURCES, et al.,)
)
Respondents.)

Case No. 11CG-CC00272

Div. 1

PETITIONERS' CONSOLIDATED REPLY BRIEF

In their respective Briefs, both the Land Reclamation Commission ("Commission") and Strack Excavating LLC ("Strack") attempt to divert the Court's attention from the legal issue which forms the basis for this action. In order to properly analyze the legal issue and refute the assertions in Respondents' Briefs, it is necessary to restate several dispositive facts:

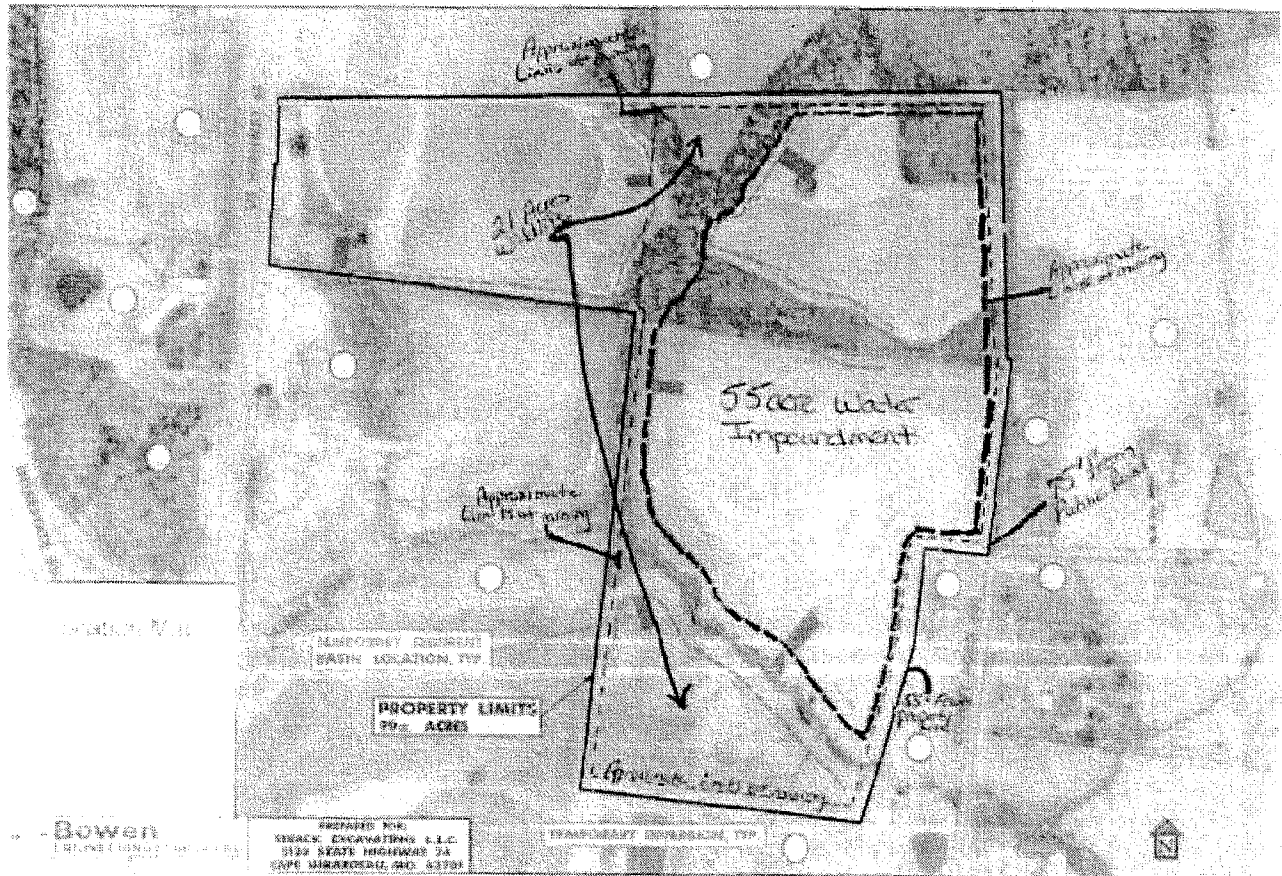
1. On November 4, 2010, Strack submitted to the Commission an application under Chapter 444, RSMo for a limestone quarry to be located east of Highway 61 and along County Road 601, just south of Fruitland, Missouri. *Pet. Ex. B (Res. Ex. 1), Permit Application for Industrial Mines.*

2. Saxony Lutheran High School, Inc. ("Saxony") is an accredited, private Lutheran high school located at 2004 Saxony Lane since 2004 along County Road 601 in Jackson, Missouri, and is located adjacent and to the south of the proposed Strack quarry. *Transcript of Proceedings*, pp. 267-68.

3. A Location Map, included with Strack's permit application, shows the "Approximate Limits of Mining" as being "55' from property line," including the Saxony property immediately to the South. *Pet. Ex. B, p. 13.* A copy of Strack's Location Map showing

the outer perimeter of its mine plan boundary is shown as the hashed line labeled “Approximate Limits of Mining” in Figure 1.

Figure 1. Strack’s Location Map Showing Mine Plan Boundary



4. Pursuant to § 444.773.3, RSMo., a formal public hearing on Strack’s mining permit application was held over four days on July 5, 6, 7 and 12, 2011. *Transcript of Proceedings*. During the time of the formal hearing, Strack’s mine plan boundary was 55’ north of Saxony’s property, as shown in Figure 1.

5. On July 11, 2011, the Governor signed House Bill 89 into law. House Bill 89, *inter alia*, enacted § 444.771, RSMo, which provides:

Notwithstanding any other provision of law to the contrary, the commission and the department shall not issue any permits under this chapter or under chapters

643 or 644 to any person whose mine plan boundary is within one thousand feet of any real property where an accredited school has been located for at least five years prior to such application for permits made under these provisions, except that the provisions of this section shall not apply to any request for an expansion to an existing mine or to any underground mining operation.¹

5. After House Bill 89 became effective on July 11, 2011, Saxony rested its case the next day. *Transcript of Proceedings, p. 696.*

6. After Saxony rested its case, Strack moved for a directed verdict, which the hearing officer granted on July 18, 2012. *Transcript of Proceedings, pp. 697-704.*²

7. On September 22, 2011, the Commission decided Saxony's appeal against Saxony and entered its Final Order, fully adopting the Hearing Officer's recommended order. *Final Order of Land Reclamation Commission, 9-22-11.* The Final Order states:

Hearing Officer, W. B. Tichenor issued his Recommended Order on August 24, 2011, that: the Application for Expansion of Permit #0832 be approved, with the mine plan boundary (*exclusive of underground mining*) to be located one thousand feet from the Strack - Saxony property line, in compliance with and as required by section 444.731 RSMo.

Id. (italics in original).

¹ The Commission misstates the text of § 444.771, RSMo., when, in the fifth line of the quotation, it uses the word "when" instead of the proper word "where." *Commission's Brief at 3.*

² Section 444.789.1, RSMo., states, "Any hearing pursuant to this section shall be of record and shall be a contested case." The applicable procedures for contested cases are set forth in §§ 536.063 - 536.083, RSMo. While Supreme Court Rule 72.01 allows for the entry of a directed verdict in a civil case, there is no counterpart to Rule 72.01 in §§ 536.063 - 536.083. Thus, the hearing officer had no statutory authority to enter a directed verdict in the subject case and erred in doing so.

8. As of September 22, 2011, Strack had not submitted any documentation to the Commission or taken any other action whatsoever to change the location of its mine plan boundary from that shown in Figure 1.³

Dispositive Issue

Based on the foregoing facts, the dispositive issue is whether § 444.771 prohibits the Commission from issuing a mining permit to Strack based on the location of Strack's mine plan boundary, or whether the Commission has statutory authority to impose a condition in Strack's mining permit which relocated Strack's mine plan boundary in order to skirt the prohibition in § 444.771.

Discussion

1. Commission's Brief.

In its Brief, the Commission asserts that it "did not impose a condition" in Strack's mining permit, but rather "applied the law existing at the time of its decision, incorporating a condition imposed by the legislature." *Commission's Brief at 7*. However, Strack, in its Brief, completely undercuts this argument. First, Strack quotes the hearing officer: "The statute does not prohibit the Commission from issuing a mining permit to the Applicant upon the condition that the mine plan boundary is beyond one thousand feet of the Saxony property. . . . (emphasis added)" *Strack Brief at 3*. Further, Strack states, ". . . Strack did not object to the suggested conditions on its mine plan boundary (emphasis added)." *Id.* Finally, Strack states, "The Hearing Officer conditioned approval upon this 1,000 foot setback being incorporated into the permit plan to comply with the new statute (emphasis added)." *Strack Brief at 9*. Clearly, Strack admits that

³ To comply with the new statute, Strack could have submitted an amended permit application reflecting a relocated mine plan boundary which was 1,000' north of Saxony's property line.

the Commission placed a condition in its mining permit.

In addition, the Commission did not apply the “existing law at the time of the decision.” In this context, § 444.771 clearly states if a mine plan boundary is located within 1,000’ of an accredited school, the only action contemplated by the General Assembly is that the Commission is prohibited from issuing a mining permit. The statute provides no leeway for the hearing officer or the Commission to unilaterally re-locate the mine plan boundary in order to skirt the statutory prohibition. Thus, contrary to the Commission’s suggestion, it did not apply the statute at all.

Also in its Brief, the Commission suggests that the provisions in §§ 444.773.3 and 444.789, RSMo., somehow provide statutory authority for the Commission to impose a condition in a mining permit. *Commission’s Brief at 8-9.* However, the plain language used in these cited statutes fails to provide any support for this assertion. In this regard, § 444.773.3, RSMo concerns the public hearing process which is held in order “to resolve concerns of the public,” and §444.789, RSMo authorizes a hearing officer to “make recommendations” to the Commission. Significantly, statutory language regarding “resolving concerns of the public” and “making recommendations” fails to contain any express legislative grant of authority to the Commission to impose a condition when issuing a mining permit.

As shown in Figure 1, as of September 22, 2011, Strack’s mine plan boundary was located 55’ north of Saxony’s property line. The plain language used in § 444.771 does not give the Commission the option to re-locate the applicant’s mine plan boundary in order to skirt the statutory prohibition. Based on the plain language used by the General Assembly in § 444.771, the only action the Commission could lawfully take -

based on the location of Strack's mine plan boundary - was to deny the permit application.

2. Strack's Brief.

In its Brief, Strack devotes several pages in discussing various aspects of *Lake Ozark/Osage Beach Joint Sewer Board v. Mo. Department of Natural Resources*, 326 S.W.3d 38 (Mo. App. W.D. 2010). *See Strack Brief at 5 - 9.* However, Strack's lengthy discussion of *Lake Ozark/Osage Beach* is a red herring because the question whether the Commission has statutory authority to place conditions in a mining permit was not an issue in *Lake Ozark/Osage Beach*. In fact, the word "conditions" only appears in the opinion twice, both as *obiter dicta* in connection with footnote 4, which merely recites the particular special conditions the Commission included in the applicant's mining permit. "*Obiter dicta*, by definition, is a gratuitous opinion. Statements are *obiter dicta* if they are not essential to the court's decision of the issue before it." *Husch & Eppenberger, LLC v. Eisenberg*, 213 S.W.3d 124, 132 (Mo. App. E.D. 2006); and *Richardson v. QuikTrip Corp.*, 81 S.W.3d 54, 59 (Mo. App. W.D. 2002). Consequently, *Lake Ozark/Osage Beach* offers absolutely no support for the argument that the Commission has statutory authority to place conditions in mining permits.

In its Brief, Strack fails to point to any statute which grants statutory authority on the Commission to impose a condition to relocate Strack's mine plan boundary. Instead, Strack suggests the Commission has "implicit" authority to impose conditions when it issues a mining permit. *Strack Brief at 11* ("Implicit within such directives must be the ability to act during the permitting process to balance the public's interest with the proposed mining activity").

To refute Strack's assertion, it is necessary to review the specific powers of the Commission which are set out in § 444.767, RSMo:

The commission may:

- (1) Adopt and promulgate rules and regulations pursuant to section 444.530 and chapter 536 respecting the administration of sections 444.760 to 444.790 and in conformity therewith;
- (2) Encourage and conduct investigation, research, experiments and demonstrations, and collect and disseminate information relating to strip mining and reclamation and conservation of lands and waters affected by strip mining;
- (3) Examine and pass on all applications and plans and specifications submitted by the operator for the method of operation and for the reclamation and conservation of the area of land affected by the operation;
- (4) Make investigations and inspections which are necessary to ensure compliance with the provisions of sections 444.760 to 444.790;
- (5) Conduct hearings pursuant to sections 444.760 to 444.790 and may administer oaths or affirmations and subpoena witnesses to the inquiry;
- (6) Order, after hearing, the revocation of any permit and to cease and desist operations for failure to comply with any of the provisions of sections 444.760 to 444.790 or any corrective order of the commission;
- (7) Order forfeiture of any bond for failure to comply with any provisions of sections 444.760 to 444.790 or any corrective order of the commission or other order of the commission;
- (8) Cause to be instituted in any court of competent jurisdiction legal proceedings for injunction or other appropriate relief to enforce the provisions of sections 444.760 to 444.790 and any order of the commission promulgated thereunder;
- (9) Retain, employ, provide for, and compensate, within the limits of appropriations made for that purpose, such consultants, assistants, deputies, clerks, and other employees on a full- or part-time basis as may be necessary to carry out the provisions of sections 444.760 to 444.790 and prescribe the times at which they shall be appointed and their powers and duties;
- (10) Study and develop plans for the reclamation of lands that have been strip mined prior to September 28, 1971;

(11) Accept, receive and administer grants or other funds or gifts from public and private agencies and individuals, including the federal government, for the purpose of carrying out any of the functions of sections 444.760 to 444.790, including the reclamation of lands strip mined prior to August 28, 1990. The commission may promulgate such rules and regulations or enter into such contracts as it may deem necessary for carrying out the provisions of this subdivision;

(12) Budget and receive duly appropriated moneys for expenditures to carry out the provisions and purposes of sections 444.760 to 444.790;

(13) Prepare and file a biennial report with the governor and members of the general assembly;

(14) Order, after hearing, an operator to adopt such corrective measures as are necessary to comply with the provisions of sections 444.760 to 444.790.

Significantly, because nothing in § 444.767 confers, either in express terms or by implication, the power to the Commission to impose conditions in mining permits, the Commission lacks such authority.⁴

In Missouri, the law is clear that an administrative agency - like the Commission - possesses no more authority than that granted to it by statute. *See A T & T Information Systems, Inc. v. Wallemann*, 827 S.W.2d 217, 221 (Mo. App. W.D. 1992); *Mueller v. Missouri Hazardous Waste Management Com'n*, 904 S.W.2d 552, 557 (Mo. App. S.D. 1995); and *Brooks v. Pool-Leffler*, 636 S.W.2d 113, 119 (Mo. App. E.D. 1982.) As more fully explained in Saxony's Opening Brief, because the General Assembly did not confer statutory authority to the Commission to impose conditions in permits in the manner that

⁴ *See State v. Carson*, 317 S.W.3d 136, 141-142 (Mo. App. E.D. 2010) ("The maxim *expressio unius est exclusio alterius* means the expression or inclusion of one thing implies the exclusion of the other or of the alternative. Black's Law Dictionary 602 (7th ed.1999). The maxim teaches that where a statute designates a form of conduct, its manner of performance and operation, and the persons and things to which it refers, there is an inference that all omissions are understood as exclusions. 2A Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* sec. 47:23 at 398-404 (7th ed. 2007)").

it did so for other environmental agencies, the Commission lacks such authority.⁵

As its fall-back position, Strack suggests that § 444.771 is an unconstitutional retrospective law. *Strack's Brief* at 9 - 10. However, Strack's argument is another red herring and should be rejected. In this regard, while Article I, § 13 of the Missouri Constitution provides that the General Assembly cannot enact a law which is retrospective in its operation, § 444.771 is not an unconstitutional retrospective law. A law is retrospective in operation if it takes away or impairs a vested or substantial right. *State ex rel Koster v. Olive*, 282 S.W.3d 842, 838 (Mo. banc 2009); *see also Beatty v. State Tax Commission*, 912 S.W.2d 492, 496 (Mo. banc 1995). In this context, "[n]either

⁵ With respect to the other environmental permits issued by agencies assigned to the Department of Natural Resources, the enabling statute expressly confers statutory authority on the issuing agency to impose appropriate conditions in the permit. *See* § 260.225.5(7), RSMo (solid waste); ("When the review reveals that the facility or area does conform with the provisions of sections 260.200 to 260.345 and the rules and regulations adopted pursuant to sections 260.200 to 260.345, the department shall approve the application and shall issue a permit for the construction of each solid waste processing facility or solid waste disposal area as set forth in the application **and with any permit terms and conditions which the department deems appropriate....**"); § 260.395.2, RSMo (hazardous waste) ("If the department determines the application conforms to the provisions of any federal hazardous waste management act and sections 260.350 to 260.430 and the standards, rules and regulations adopted pursuant to sections 260.350 to 260.430, it shall issue the hazardous waste transporter license **with such terms and conditions as it deems necessary** to protect the health of humans and the environment...."); § 643.075.2, RSMo (air) ("Every source required to obtain a construction permit shall make application therefor to the department and shall submit therewith such plans and specifications as prescribed by rule. The director shall promptly investigate each application and if he determines that the source meets and will meet the requirements of sections 643.010 to 643.190 and the rules promulgated pursuant thereto, he shall issue a construction permit **with such conditions as he deems necessary** to ensure that the source will meet the requirements of sections 643.010 to 643.190 and the rules"); and § 644.051.3, RSMo (water) ("... If the director determines that the source meets or will meet the requirements of sections 644.006 to 644.141 and the regulations promulgated pursuant thereto, the director shall issue a permit **with such conditions as he or she deems necessary** to ensure that the source will meet the requirements of sections 644.006 to 644.141 and any federal water pollution control act as it applies to sources in this state....") (emphases supplied).

persons nor entities have a vested right in a general rule of law or legislative policy that would entitle either to insist that a law remain unchanged." *Id.* Thus, Strack has no vested right in having its application reviewed under the law in effect at the time of its application.

Furthermore, Strack acquired no any vested rights by reason of its pending permit application. The law is well settled that the filing of an application for a permit does not create any vested right for the applicant. *See Lee v. Board of Zoning Adjustment*, 297 S.W.3d 107, 112 (Mo. App. W.D. 2009) ("the mere filing of the application gave the applicant no vested right under the old ordinance"). In addition, the law is clear that once a party acquires a license or permit, that party has no vested right in the continuation of the license or permit. In this context, the Western District Court of Appeals recently stated in *Missouri Real Estate Commission v. Rayford*, 307 S.W.3d 688, 691-692 (Mo. App. W.D. 2010),

In short, no one who possesses a license has the right or ability to presume the license is "vested" or that the license has an "independent existence." Rather, the license remains subject to the laws and regulations which authorized its issuance in the first place, which is the antithesis of a vested right. Those laws and regulations may impose criteria for eligibility, both initially or following licensure, may require annual or other renewals, and may impose conditions on a license's continued viability tied to standards of conduct. A license provides one the authority to provide or perform certain services, or to engage in a particular business or avocation. Obtaining a license may well create a sense of dependence, even reliance, on the license's continued viability, so much so that its

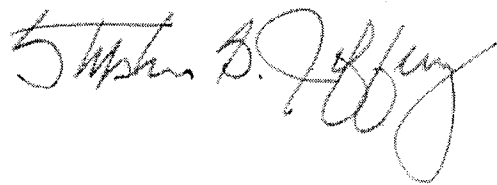
revocation, suspension, or lack of renewal may result in severe hardship to one whose livelihood has come to depend on the license. However, the importance of the license to the licensee has no bearing on whether the license is a vested or substantial right for purposes of article I, section 13 of the Missouri Constitution....

Strack's argument that its efforts to get its proposed quarry permitted arise to the level of a vested right defies all logic and is directly contrary to *Lee v. Board of Zoning Adjustment* and *Missouri Real Estate Commission v. Rayford*. Accordingly, because Strack has no vested rights in its permit application, § 444.771 is not a retrospective law.

Conclusion

Pursuant to § 444.771, the Commission is prohibited from issuing a mining permit to any person whose mine plan boundary is located within 1,000' of an accredited school. As of September 22, 2011, Strack's mine plan boundary was located 55' from Saxony's property line. Under its enabling statutes, the Commission had no authority to impose a special condition in its September 22, 2011 Final Order unilaterally relocating Strack's mine plan boundary. The only party that could have moved its mine plan boundary was Strack, but it chose not to do so. Thus, based on § 444.771, it is clear the only lawful action the Commission could take was to deny Strack's permit application.

Accordingly, the Court should declare that the Commission's Final Order is unlawful, vacate the Commission's issuance of the mining permit to Strack, remand this matter to the Commission with direction to deny the permit application, and award such further relief the Court deems just and appropriate.



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Certificate of Service

The undersigned certifies that a true copy of the foregoing document was served by facsimile transmission and by First Class U.S. Mail, postage prepaid, on this 22nd day of May, 2012 to the following:

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